Petition

81-1594

NO. 81-

Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

JOSEPH G. HATHEWAY, JR.,

Petitioner,

vs.

SECRETARY OF THE ARMY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals erred in ruling that the special needs of the military doctrine does not weigh in favor of heightened judicial scrutiny in the context of the issues presented by this case?

2. Whether the United States Court of Appeals erred in ruling that a court-martial convening authority does not violate the due process clause of the Fifth Amendment when, under 10 U.S.C. §925, Article 125, Uniform Code of Military Justice (hereinafter Article 125, U.C.M.J.), he prosecutes only service members accused of acts of homosexual sodomy while at the same time refusing to prosecute service members accused of acts of heterosexual sodomy?

3. Whether the United States Court of Appeals erred in ruling that a service

member who is court-martialed under Article 125, U.C.M.J., for committing homosexual sodomy, does not have standing to challenge the constitutionality of the prohibitions of Article 125, U.C.M.J., against heterosexual sodomy?

4. Whether the United States Court of Appeals erred in ruling that Article 125, U.C.M.J., does not violate the Establishment Clause of the First Amendment?

5. Whether the United States Court of Appeals erred in ruling that the instruction on reasonable doubt, as stated in the Department of the Army's Military Judges Guide, is not violative of the due process clause of the Fifth Amendment?

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III.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 641 F.2d 1376 and is appended hereto at 1a.

The per curiam opinions of the United States Army Court of Military Review and the United States Court of Military Appeals are appended hereto at 31a and 29a, respectively.

The judgment of the federal district court for the Northern District of California was not accompanied by a memorandum opinion.

IV.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on April 20, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

V.

STATUTORY PROVISION INVOLVED

Article 125, U.C.M.J.:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

VI.

STATEMENT OF THE CASE

On January 9, 1976, Petitioner Hatheway, who was then serving with the United States Army as a First Lieutenant with the First Special Forces Battalion, Bad Toelz, Federal Republic of Germany, was found by a general court-martial composed of members to have committed homosexual sodomy with another service member and was therefore found to have violated Article 125, U.C.M.J. The court-martial sentenced

Hatheway to be dismissed from the Army. Hatheway appealed his conviction and sentence to the United States Army Court of Military Review, and on November 11, 1977, the Court of Military Review affirmed the conviction and sentence. 31a. Hatheway then petitioned the United States Court of Military Appeals and on August 22, 1978, the Court of Military Appeals affirmed the ruling of the Army Court of Military Review. 29a.

On March 6, 1979, Hatheway filed an action in the federal district court for the Northern District of California, and therein sought declaratory, injunctive and mandamus relief, declaring that his court-martial conviction and sentence were null and void and directing the Respondent not enforce the collateral consequences of his court-martial judgment. On November 5, 1979, the district court denied Hatheway's motion for summary judgment and granted

summary judgment for Respondent. Hatheway appealed the judgment of the district court to the United States Court of Appeals for the Ninth Circuit, and on April 20, 1981, the Court of Appeals affirmed the judgment of the district court.

At his court-martial, Hatheway moved to dismiss the charge against him on the basis that his court-martial convening authority prosecuted only cases involving homosexual sodomy and would prosecute none involving heterosexual sodomy, even though the convening authority was aware of such cases and even though heterosexual sodomy is prohibited by Article 125, U.C.M.J. [CR 11, pp. 759-760] The military judge denied the motion without the holding of an evidentiary hearing on the matter and ruled that prosecutorial decisions were completely within the discretion of court-martial convening authorities. [Id.]

In his court-martial, Hatheway

challenged Article 125, U.C.M.J., as applied to both heterosexual and homosexual sodomy. [CR 11, pp. 678-696, 1209-1243] Those challenges were denied by the military judge.

At his court-martial, Hatheway also objected to the instruction on reasonable doubt, which was provided in the Department of the Army's Military Judges Guide and which was given at his court-martial [CR 11, p. 1146-1147], but the objection was overruled and the instruction was given. [Id. at p. 1116]

Before the Army Court of Military Review, the United States Court of Military Appeals and the federal district court, Hatheway, inter alia, raised all of the issues raised in this petition. In its per curiam opinion affirming the conviction and sentence, the Army Court of Military Review did not articulate its analysis of the issues. 31a. The Court of Military Appeals likewise affirmed without

articulating its analysis of the issues, except that it did cite United States v. Scoby, 5 M.J. 160 (C.M.A. 1978), a case upholding Article 125, U.C.M.J., as applied to homosexual acts committed in a public place. The district court entered judgment for respondent without a memorandum opinion.

The Court of Appeals affirmed the judgment of the district court and articulated its reasons in a written opinion. 1a-28a. It opined that since it had found in Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1978)[1], that military officials had an important interest in prohibiting homosexual acts by its members, that selective enforcement of Article 125, U.C.M.J. against only homosexual acts of sodomy "bares a substantial relationship

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1. Beller involved challenges to Naval regulations which provide for the administrative discharge of service members found to have committed homosexual acts.

to an important governmental interest." 20a. Second, the Court of Appeals ruled that Hatheway did not have standing to raise constitutional challenges to the heterosexual prohibitions of Article 125, U.C.M.J., 23a. It found that statutes prohibiting homosexual sodomy, such as Article 125, U.C.M.J., have religious origins, 23a, but that Article 125, U.C.M.J., is nevertheless not violative of the Establishment Clause of the First Amendment because it has a "legitimate secular purpose and effect." 25a. Finally, the Court of Appeals ruled that the reasonable doubt instruction given at Hatheway's court-martial was not constitutionally defective. 28a.

Before the Court of Appeals, Hatheway contended, as he had done at court-martial and before both military appellate courts

and the district court, that it should manifestly consider the special needs and circumstances of military life in its disposition of these constitutional claims. However, Hatheway argued that proper application of that special needs doctrine weighed in favor of his position, because specific consideration of the needs and circumstances of the military community demonstrate in the context of the issues in this case, that heightened judicial scrutiny is required. In its opinion, the Court of Appeals addressed this argument only within the context of Hatheway's prosecutorial discrimination claim and then denied relief. 14a-15a.

Jurisdiction of the district court was invoked under 28 U.S.C. §§1331, 1361 and 2201.

VII.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals Decides Important Questions of Federal Law Arising Within the Military Which Have Not Been, But Should Be, Settled by this Court.

A. The Proper Application of the Special Needs of the Military Doctrine

A line of cases by this case has firmly established that in deciding constitutional claims arising within the military community, courts should take into consideration the special needs and circumstances of military life. See Parker v. Levy, 417 U.S. 733 (1974); Schlesinger v. Councilman, 420 U.S. 738 (1975); Greer v. Spock, 424 U.S. 828 (1976); and Middendorf v. Henry, 425 U.S. 25 (1976); and Brown v. Glines, 444 U.S. 348 (1980). In the context of the constitutional claims raised in the above-cited cases, this Court found that evaluations of the special needs and circumstances of the military weighed in favor of permitting greater governmental restrictions than would be constitutionally tolerable within the civilian community. However, proper application of this constitutional doctrine, which takes into account the

special needs and circumstances of military life, does not automatically result in greater judicial deference to every official act pertaining to service members. Instead, application of the special needs doctrine should properly require that courts weigh the right of the individual as against the specific needs and circumstances existing in the military community, and thereafter decide whether those special needs weigh in favor of greater or less judicial deference to the official action involved.

As to the issues raised here, Hatheway contends, as he did below and as he does infra, that the analysis of the special needs and circumstances of military life do not weigh in favor of judicial deference to these official actions, but instead in favor of heightened judicial scrutiny. Proper application of the special needs doctrine is an important question of federal constitutional law to cases arising

in the military, and the Court of Appeals failed properly to apply this constitutional doctrine to disposition of Hatheway's constitutional claims. The failure of the Court below justifies the grant of certiorari.

B. Selective Prosecution of Only Homosexual Sodomy Under Article 125, U.C.M.J.

A reading of Article 125, U.C.M.J., and the relevant provision at ¶204 of the Manual for Courts-Martial (1969 Rev. Ed.) demonstrates that the Article criminalizes such sexual acts as fellatio, cunnilingus and anal intercourse, and that it does not matter whether the participants are members of the same or opposite sex. Article 125, U.C.M.J., has been given no limiting construction by military or civilian courts.

Since the ruling of this Court in Yick Wo v. Hopkins, 118 U.S. 356 (1886),

it and the lower court have held that prosecutorial decisions which are premised upon unconstitutional classifications are violative of the equal protection guarantees. See, e.g., Oyler v. Boles, 368 U.S. 448 (1962); United States v. Falk, 479 F.2d 616 (7th Cir. 1973)(en banc); United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974); and United States v. Steele, 461 F.2d 1148 (9th Cir. 1972). Hatheway's allegations at court-martial in support of his motion to dismiss his criminal charge raised two impermissible classifications upon which the decision to court-martial him was based. The first was the homosexual, as opposed to heterosexual, nature of the act. The second was his gender.[1] The Court of Appeals held

1. Below, Hatheway contended that selective enforcement of Article 125, U.C. M.J., was a form of gender discrimination. (Opening Brief of Appellant, pp. 16-18 in the Court of Appeals) He argued that had he been a female and performed the same acts in the same circumstances, the act would have been heterosexual in nature and that though such an act would have been violative of Article
(Footnote continued on next page)

that selective prosecution of homosexual acts under Article 125, U.C.M.J., bore a substantial relationship to the military's important interests in prohibiting acts of homosexual sodomy. 20a.

This holding by the Court of Appeals is erroneous in several respects. First, prosecutorial discrimination by military officials is in direct conflict with the military's express needs for strict order and discipline. Such selective use of the criminal law, which systematically allows certain forms of proscribed conduct to go

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(Footnote continued from preceding page) 125, U.C.M.J., he would not have been prosecuted because his convening authority did not court-martial acts of heterosexual sodomy. Thus, but for his gender, Hatheway could have participated in the identical acts and not have been prosecuted. Though this Court has applied the "but for" test in gender discrimination cases, e.g., Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 1108 (1979), the decision of the Court of Appeals did not address this contention concerning gender based discrimination.

unpunished, does not further the concept of order and discipline. To the contrary, it enhances in the minds of service members the idea that the rule of law is what a particular convening authority at a given time chooses it to be. As the United States Court of Appeals for the Second Circuit has stated:

> Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations. . . as the basis for determining its applicability.
> United States v. Berrios, 501 F.2d 1207, 1209 (2d Cir. 1974).

Requiring military officials to enforce both the heterosexual and homosexual prohibitions of Article 125, U.C.M.J., certainly does not hinder the military in furthering its interest in prohibiting acts of homosexual sodomy. Such equal enforcement under the Article would simply mean that the object of the legislation, i.e., the prohibition of all acts of sodomy, would be furthered.

Second, where prosecutorial discrimination occurs in the enforcement of the Uniform Code of Military Justice, the practice strikes at the heart of civilian control of the military, as provided by Article I, §8 of the Constitution. As recently stated in Rostker v. Goldberg, ___U.S.____, 49 U.S.L.W. 4798, 4804, n.15, "[T]he grant of constitutional authority is, after all, to Congress and not to the Executive or military officials." The court-martial convening authority, who selectively enforces Article 125 against only homosexual sodomy, in effect thwarts the will of Congress by punishing only homosexual acts while intentionally allowing heterosexual acts of sodomy to go unpunished.

Third, the very nature of the military, as compared with the civilian community, weighs in favor of heightened judicial scrutiny in the area of selective enforcement of the criminal law by military officials. In the civilian community, prosecutorial

abuses are checked to some extent by the democratic process.[1] Service members, however, do not possess the right to vote their convening authority out of office. Thus, judicial scrutiny is the only effective means of insuring that enforcement of the criminal law by military officials does not become an arbitrary sword in the hands of a court-martial convening authority for use against certain of its troops.

In finding that the military's need to prohibit homosexual acts justifies the selective enforcement of Article 125, U.C.M.J., against only homosexual sodomy, the Court of Appeals failed to weigh the above described needs and circumstances of the military community. The failure of the court below justifies the grant of certiorari

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1. Many state solicitors and district attorneys are popularly elected, and United States attorneys are frequently replaced when there occurs a change in presidential administrations.

on this important question of federal law pertaining to the administration of justice within the military.

C. Hatheway's Standing to Challenge Article 125, U.C.M.J., As Applied to Sodomy Between Spouses or Heterosexual Singles.

The ruling of this Court in Carey v. Population Services International, 431 U.S. 678 (1977) makes clear that the area of personal and sexual privacy is one of the exceptions to the general rule which prohibits challenges to statutes on the basis of how the legislation may be applied to parties not before the Court. In allowing plaintiffs in Carey to challenge a state statute that prohibited the distribution of contraceptives to various persons, this Court stated:

> Indeed, the case for the vendors' standing to assert the rights of potential purchasers of his product is even more compelling here than in Craig, because the rights fall within the sensitive area of personal privacy. In such a case, potential purchasers "may

> be chilled from. . .assertion [of their own rights] by a desire to protect the very privacy [they seek to vindicate] from the publicity of a court suit."
> Id., 431 U.S. at 684, n.4[1] (insertions in original).

The Court of Appeals incorrectly reasoned that "Carey does not support the proposition that an alleged abridgement of personal autonomy rights is a sufficient basis for relaxing the usual rules of standing." 22a.

Analysis of the special circumstances of military life demonstrates that those conditions indeed strength the considerations found in Carey to support third party standing. First, this Court has recognized

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1. It should be noted that Mr. Justice Brennan in Carey wrote for three other members of the Court and that Justices White, id., at 702, Powell, id., at 703, and Stevens, id., at 712, joined in this Court's disposition of the standing issue. Therefore, seven of the justices were in agreement in Carey that the area of privacy constitutes an exception to traditional rules of standing.

that the military community is different from the civilian because the former "constitutes a specialized community governed by separate discipline." Orloff v. Willoughby, 345 U.S. 83 (1953). Thus, prohibitions in a sodomy statute against interspousal sodomy and heterosexual sodomy between others, though not enforced by way of courts-martial, are more likely to chill the exercise of those sexual activities than would the same statute in civilian society. In fact, Hatheway's proffers of testimony by two service members demonstrated just such a chilling effect. [CR. 11, pp. 670-74]

Second, the failure of the Army to court-martial heterosexual sodomy, supra, pp. 12-17, makes it unlikely that service members, including spouses desiring to participate in such sexual acts, would have the opportunity to assert those rights in a court-martial proceeding. Third, as noted in Carey, supra, 431 U.S. at 684, and in Eisenstadt v. Baird,

405 U.S. 438, 443-46 (1972), to require service members desiring to participate in heterosexual sodomy to file a civil action challenging Article 125, U.C.M.J., will require the assertion in a court of law of the rights for which privacy is sought.

In finding that Hatheway did not possess standing to challenge prohibitions of Article 125, U.C.M.J., as applied to heterosexual sodomy, the Court of Appeals

failed to weigh the above described circumstances of the military community. The failure of the court below justifies the grant of certiorari on this important question of federal law pertaining to standing to raise personal autonomy and privacy rights of service members.

D. Whether the Prohibitions of Article 125, U.C.M.J., Against Homosexual Sodomy Violate the Establishment Clause of the First Amendment.

As demonstrated by one of the witnesses at Hatheway's court-martial, prohibitions against sodomy have a demonstrable Judeo-Christian history and purpose. [CR. 11, pp. 1236-1242] The Court of Appeals found that sodomy laws, such as Article 125, U.C.M.J., have not undergone substantial revisions since their religious inception and that they have not been advocated by secular groups. 23a-24a. Nevertheless, the Court below found that the Army's interest in "preventing

disruptive conduct," id. at 1384, provides a secular purpose and effect for the enforcement of the sodomy prohibitions of Article 125, U.C.M.J.

As this Court stated in Committee for Public Education and Religious Lib. v. Nyquist, 413 U.S. 756 (1973), to be valid under the Establishment Clause, a law must pass a three-prong test: (1) it must reflect a clearly secular purpose; (2) its primary effect must be to neither advance nor inhibit religion; and (3) it must avoid excessive government entanglement with religion. Id., 413 U.S. at 772-73.

Article 125, U.C.M.J., prohibits sodomitic acts per se. For example, the situs of the proscribed act is of no consequence. The acts are criminal offenses whether performed in a marital bedroom, at a location thousands of miles from a military installation, or in front of the post exchange. Moreover, whether the act is

consented to or effected by application of force matters only for purposes of sentencing. Manual for Courts-Martial (1969, Rev. Ed.), ¶127. Distinctions between acts performed with minors or with adults are again only relevant for sentencing. Id. Whether the parties to the sexual acts are both members of the military or whether one is a civilian is of no legal significance. It is important to notice that the broad prohibitions of Article 125, U.C.M.J., require only proof of the sexual act itself and not proof that the act under the circumstances did injury to the secular interest of the military. Thus, enforcement of the criminal prohibitions of Article 125, U.C.M.J., without requiring proof of injury to the legitimate interest of the military, entangles the government with the advancement of religion orthodoxy because it involves it in criminal prosecutions regardless whether the acts in question did injury to a governmental interest.

Moreover, homosexual acts by military officials such as Hatheway, which occur in circumstances "constitut[ing] conduct unbecoming an officer and gentleman" may be court-martialed under Article 133, U.C.M.J. Manual for Courts-Martial (1969 Rev. Ed.), ¶212. Homosexual acts by all service members which occur in circumstances "to the prejudice of good order and discipline" or "of a nature to bring discredit upon the armed forces" can be court-martialed under Article 134, U.C.M.J. Id., at ¶213. Importantly, had Hatheway been prosecuted under Articles 133 or 134, U.C.M.J., the military would have had the burden of showing not only that the sodomitic acts occurred, but also that they were done in circumstances injurious to the legitimate secular interests of the Army. In prosecutions under Article 125, U.C.M.J., no such showing was required. Assuming therefore that the military has a legitimate interest in pro-

hibiting disruptive homosexual acts by its members, that interest can be achieved by prosecutions under Articles 133 and 134, U.C.M.J. Thus, in light of these other two Articles of the Uniform Code of Military Justice, the court-martial of homosexual acts under Article 125, U.C.M.J., in which no proof that the sexual acts did injury to the interest of the military is required, is an unnecessary entanglement with the furtherance of the Judeo-Christian concept of sin, and therefore violative of the Establishment Clause.

In finding that prosecutions under Article 125, U.C.M.J., do not violate the Establishment Clause, the Court of Appeals failed both to apply correctly the decisions of this Court and to weigh the above-described circumstances of the military community. This failure of the court below justifies a grant of certiorari on this important question of federal law pertaining to Establishment Clause issues

raised by the enforcement of sodomy statutes.

E. The Reasonable Doubt Instruction in the Department of the Army's Military Judges Guide.

Over Hatheway's objection [CR. 11, p. 1116], the military judge at his court-martial gave the instruction on reasonable doubt found in the Department of the Army's Military Judges Guide.[1] That instruction used the "willingness to act" definition which was condemned by this Court in Holland v. United States, 348 U.S. 121, 140 (1954). Moreover, the instruction twice equated reasonable doubt with "substantial doubt," a practice that this Court has recently noted to be confusing. Taylor v. Kentucky, 436 U.S. 478, 488 (1978). The Court of Appeals ruled that the instruction did not deny Hatheway due process of law, but in

1. Pertinent portions of the instructions are set out in the opinion of the Court of Appeals, 4a.

doing so, the Court below again failed to take into account the circumstances of the military community.

In this regard it should be noted that unlike the random selection process used in selecting juries in civilian practice, 10 U.S.C. §825, Article 25, U.C.M.J., provides that court-martial convening authorities shall assign specific persons to serve as military jurors. As noted by the United States Court of Military Appeals, military jurors:

> [H]andpicked by the convening authority and of which only four of a required five ordinarily must vote to convict for a valid conviction to result, are a far cry from the jury scheme which the Supreme Court has found constitutionally mandated in criminal trials in both federal and state courts.
> United States v. McCarthy, 25 U.S.C.M.A. 30, 36 n.3, 54 C.M.R. 30, 36 n.3 (1976)

Such hand-picked jurors may have been chosen by the convening authority because they are personal acquaintenances of his

and are felt to be predisposed to a finding of guilt. For example, four jurors in Hatheway's court-martial knew the convening authority personally and two were on his staff. [CR. 11, pp. 840-853] In light of this peculiar method of selecting jurors, as mandated by the Uniform Code of Military Justice, it is therefore imperative that military jurors be clearly instructed on the concept of proof beyond a reasonable doubt. When military jurors are not so instructed, the opportunity for prejudicial error is far greater than in the civilian setting.

In finding that the instruction on reasonable doubt at issue here did not deny Hatheway due process of law, the Court below failed to consider the specific circumstances of jury selection required at courts-martial. The failure of the Court below justifies the grant of certiorari on this important question of federal law

pertaining to the administration of justice in the military.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

JOSEPH G. HATHEWAY, JR.,: NO. 80-4013
[Argued and Sub-
vs. : mitted December
8, 1980. Decided
SECRETARY OF THE ARMY. : April 20, 1981.]

Before WRIGHT, CHOY, and ANDERSON,
Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

I.

Lieutenant Hatheway was convicted of sodomy by a general court-martial. Article 125 of the Uniform Code of Military Justice, 10 U.S.C. §925 (1976) makes it a crime for a serviceperson to engage "in unnatural carnal copulation with another person of the same or opposite sex."

Prior to trial, Hatheway offered to prove that the convening authority prosecuted only cases involving homosexual sodomy, and would prosecute none involving heterosexual sodomy, even though he was aware of such cases. The Military Judge

ruled that, even if Hatheway could establish those facts, his prosecution would be permissible.[1]

At trial, the evidence indicated Hatheway spent several hours drinking with Private Lynde, an enlisted man in his unit. They were in Lynde's room, and Lynde's roommates came and went during that time. Hatheway and Lynde then engaged in several acts of sodomy. Lynde's roommate entered the room and found them undressed.

Lynde testified under a grant of immunity from sodomy or perjury prosecution. His testimony conflicted with sworn statements he had made at a preliminary investi-

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1. The judge stated:

> Perhaps I can make a ruling which will preserve for appeal the issue that you see. I rule that the trial will not be barred--and this trial is not barred--even if it were established as fact that the convening authority would under no circumstances prosecute heterosexual sodomy between consenting adults, but would prosecute homosexual sodomy between consenting adults.

gation. He had stated that Hatheway engaged in sodomitic acts, but that he did not. His roommate also testified.

Hatheway challenged Article 125 on various constitutional grounds as it applies to homosexual and heterosexual sodomy. He offered to prove it has a chilling effect on intraspousal, heterosexual sodomy, and introduced affidavits to the effect that sodomy prohibitions have religious origins and that homosexual acts, standing alone, are not harmful.

He also raised a defense of unconsciousness. One psychiatrist testified Hatheway suffered from "pathological intoxication" and stated his opinion that Hatheway was not conscious of the sodomitic acts. Another psychiatrist testified this was a real possibility. Hatheway objected to the use of a reasonable doubt instruction found in the Department of the

Army's Military Judges Guide.[2]

Finally, Hatheway made several claims of electronic and non-electronic surveillance. The Military Judge, pursuant to 18

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2. The instruction was as follows:

By "reasonable doubt" is intended not a fanciful or ingenious doubt or conjecture, but substantial, honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest, substantial misgiving generated by insufficiency of proof of guilt. Proof beyond reasonable doubt means proof to a moral certainty although not necessarily to an absolute or mathematical certainty. If you have an abiding conviction of the accused's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt. The rule as to reasonable doubt extends to all elements of the offense although each particular fact advanced by the prosecution which does not constitute an element, need not be established beyond a reasonable doubt. If, on the whole evidence, the court is satisfied beyond a reasonable doubt of the truth of each and every element, the court should find the accused guilty. CR 11, pp. 1146-47 (emphasis indicates that portion of the instruction contested).

U.S.C. §3504, required the Army to affirm or deny the allegations of electronic surveillance. After three hearings, he concluded the Army's denial was adequate.

Hatheway was convicted and sentenced to dismissal from the service. He filed extensive assignments of errors with the Army Court of Military Review which affirmed without articulating its analysis of the issues raised here.

The United States Court of Military Appeals granted Hatheway's petition for review. It, too, affirmed without articulating its analysis of the issues, except to cite United States v. Scoby, 5 M.J. 160 (C.M.A. 1978)(upholding Article 125 as applied to acts committed in a public place).

After Hatheway's dismissal from the service, he filed an action in district court alleging jurisdiction under 28 U.S.C. §§ 1331, 1361 and 2201. He sought a de-

claration that his conviction was invalid, and an order that he be given an honorable discharge and all pay and benefits denied becuase of his conviction.

The district court granted the Secretary's motion for summary judgment.

II.

The district court had equitable jurisdiction under 28 U.S.C. §1331 and mandamus jurisdiction under §1361.[3] See

3. "Under the Tucker Act, a district court has jurisdiction to award damages against the United States to a maximum of $10,000. All other monetary claims must go to the Court of Claims." Glines v. Wade, 586 F.2d 675, 681 (9th Cir. 1978), rev'd on other grounds, sub nom. Brown v. Glines, 444 U.S. 348, 100 S.Ct. 609, 62 L.Ed.2d 540 (1980). Hatheway did not allege jurisdiction under the Tucker Act. His requests for declaratory and injunctive relief, however, were within the district court's jurisdiction. Id. 586 F.2d at 681-82. See Rowe v. United States, 633 F.2d 799 at 800-02 (1980); Beller v. Middendorf, 632 F.2d 788, 795-99 (9th Cir. 1980)

Kauffman v. Secretary of the Air Force, 415 F.2d 991, 994-96 (D.C.Cir.), cert. denied, 396 U.S. 1013, 90 S.Ct. 572, 24 L.Ed. 505 (1970); Baker v. Schlesinger, 523 F.2d 1031, 1034-35 (6th Cir. 1975), cert. denied, 424 U.S. 972, 96 S.Ct. 1473, 47 L.Ed.2d 741 (1976)(mandamus); 1 Moore's Federal Practice ¶0.5[4.-2] at 173-74 (2d ed. 1980). See also Schlesinger v. Councilman, 420 U.S. 738, 745, 95 S.Ct. 1300, 1306, 43 L.Ed.2d 591 (1975)(Article 76 of the Uniform Code of Military Justice, 10 U.S.C. §876, which makes court-martial judgments binding on civilian courts, does not deprive federal courts of jurisdiction over challenges to court-martial proceedings).

The district court could not, however, directly review the determination of the military courts. "The valid, final judgments of military courts, like those of any court of competent jurisdiction not subject to direct review for errors of fact or

law, have res judicata effect and preclude further litigation of the merits." Schlesinger v. Councilman, 420 U.S. at 746, 95 S.Ct. at 1307.

The district court's authority to order the Army to upgrade Hatheway's discharge could be exercised only upon a determination that the court-martial judgment was void, i.e., "because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifie[d] nor bar[red] relief from its consequences." Id. at 747, 95 S.Ct. at 1307.

The threshold question, then, is whether Hatheway has alleged a defect which would justify holding his court-martial conviction void. We hold that in alleging that Article 125 is unconstitutional and that the court-martial proceedings violated his rights to due process and equal protection, he has alleged such fundamental defects.

The Secretary argues that the primary

question is whether Hatheway's constitutional arguments were given "full and fair consideration" by the military courts. The Army's position is that if such consideration was given, there is no basis for invalidating the court-martial judgment.[4]

In Burns v. Wilson, 346 U.S. 137, 142, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953), a plurality opinion stated:

> In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings--of the fair determinations of the military tribunals after all military remedies have been exhausted. . . .[W]hen a military decision has dealt fully and fairly with an allegation raised in [an] application [for a writ of habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.

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4. It is difficult to determine whether Hatheway's constitutional arguments received full and fair consideration, because none of the military courts articulated its analysis of them.

The Burns plurality does not preclude civil court consideration of the constitutional defects alleged here. See Kauffman v. Secretary of the Air Force, 415 F.2d at 996-97. See also United States v. Augenblick, 393 U.S. 348, 351, 89 S.Ct. 528, 531, 21 L.Ed.2d 537 (1969)(suggesting proper scope of review is an open question).

In habeas corpus proceedings, a court-martial conviction may be deemed void because of constitutional defects. Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), the Court considered First Amendment arguments in an appeal from a habeas proceeding without any discussion of whether there had been "full and fair consideration" of the issues by the military courts.

We recognize, as the Supreme Court noted in Councilman, that

> the grounds upon which military judgments may be impeached collaterally are not necessarily

> invariable. For example, grounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief. Lacking a clear statement of congressional intent one way or the other, the question whether a court-martial judgment properly may be deemed void--i.e., without res judicata effect for purposes of the matter at hand--may turn on the nature of the alleged defect, and the gravity of the harm from which relief is sought.

420 U.S. at 753, 95 S.Ct. at 1310.

Hatheway is a convicted felon. Although he has not been imprisoned, his conviction resulted in a dishonorable discharge that can cause "lasting, serious harm in civilian life." Id. at 752, 95 S.Ct. at 1310. Given the seriousness of the harm, we think constitutional defects such as he has alleged would justify holding the conviction void.

His allegations that the Army did not comply with 18 U.S.C. §3504(a)(1)(1976) are not sufficient, however, to merit collateral review. They were given full and

fair consideration by the Military Judge.

Section 3504(a)(1) provides:

> In any trial. . .upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act.

Hatheway's argument is that the Army's response to his claims of surveillance was inadequate under this statute. Although the statute promotes constitutional values, see Alderman v. United States, 394 U.S. 165, 180-85, 89 S.Ct. 961, 970-71, 22 L.Ed.2d 176 (1969)(illegal surveillance must be disclosed to permit adversary hearing on question of "taint"), it is analogous to a rule of discovery. Compliance is not a constitutional question, an erroneous determination of which would permit voiding the judgment of the military court.

Cf. Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)(Fourth

Amendment violations not cognizable in federal habeas corpus proceeding if a full and fair hearing was provided in state courts).

III.

The Military Judge preserved Hatheway's selective prosecution claim for appellate review by ruling that, even if the convening authority prosecuted cases involving homosexual sodomy, but refused to prosecute cases involving heterosexual sodomy, Hatheway's prosecution would not be unconstitutional.

In order to prevail, Hatheway must establish that others are not prosecuted for the same conduct, and that the decision to prosecute was based on "impermissible" grounds. See United States v. Wilson, 639 F.2d 500 (9th Cir. 1981); United States v. Choate, 619 F.2d 21, 23 (9th Cir.), cert. denied, ___U.S.___, 101 S.Ct. 354, 66 L.Ed.2d 214 (1980).

Given the ruling by the Military Judge, we must decide whether the commission of homosexual acts is an "impermissible" ground for selective prosecution under Article 125.[5] We hold that it is not.

In Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), we upheld a "military

5. The Army argues Hatheway was prosecuted because he was an officer engaged in sodomy with an enlisted man in the barracks. Hatheway argues that if he had engaged in heterosexual sodomy under similar circumstances he would not have been prosecuted.

We cannot resolve this factual issue on appeal. The Military Judge's ruling presumed Hatheway was prosecuted because he engaged in homosexual sodomy, and would not have been prosecuted had he engaged in heterosexual sodomy. We must determine, therefore, whether selecting those who engage in homosexual acts for prosecution under Article 125 violates the Fifth Amendment.

The Military Judge rested his ruling on the proposition that the convening authority has complete discretion in deciding what cases are to be referred to courts-martial. We cannot agree. The convening authority must exercise his discretion in a constitutional manner.

Hatheway argues that the discretionary acts of the convening authority should be given less deference than those of a civilian prosecutor. We cannot accept this position either. Prosecutorial discretion

(Footnote continued on next page)

regulation which prohibits personnel from engaging in homosexual conduct while they are in the service." Id. at 810. The litigants in Beller were given honorable discharges. The issue was whether the regulation violated their rights to personal autonomy protected by the due process clause of the Fifth Amendment. Id. at 807.

Our review of the regulation involved more than the cursory glance characteristic of the rational basis test. See id. at 809 (case lies between the two extremes of substantive due process review). Instead, we undertook a careful balancing of the nature of the individual interest, the importance of the governmental interest, the degree to

(Footnote continued from preceding page)
is an essential element of law enforcement in military as well a [sic] civilian society. Our inquiry, in a collateral attack such as this, is limited to whether that discretion has been exercised in a constitutionally permissible manner.

which the individual interest was infringed, and the availability of less restrictive means to safeguard the governmental interest. Id. at 807-12.

It was unnecessary, given the flexibility of substantive due process analysis, to determine the precise nature of the individual interest in engaging in private homosexual conduct. Conceding that the interest might be constitutionally protected, our analysis focused on the importance of the governmental interest.

The unique demands of the military were "crucial." Id. at 810. We considered "the importance of the military's role, the special need for discipline and order in the service, [and] the potential for difficulties arising out of possible close confinement. . .[on] bases for long periods of time." Id. at 812. We found that, among other factors, "doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she

commands" supported the Navy's regulation. Id. at 811.

We concluded:

> [T]he importance of the government interests furthered, and to some extent the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct.

Id. at 810.

We understand Hatheway's claim (that the commission of a homosexual act is an impermissible basis for prosecution) to be an equal protection argument. We must apply the "rather formal three-tier analysis of the Court's recent equal protection decisions," id. at 807, instead of the more flexible substantive due process analysis that was applicable in Beller. Classifications which are based solely on sexual preference implicate the "right to be free, except in very limited circumstances, from

unwarranted government intrusions into one's privacy." Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969).[6] Given the similarity

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6. The principle underlying the constitutional right to personal autonomy often has been articulated by the Court as follows:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), quoted in, e.g., Stanley v. Georgia, 394 U.S. at 564, 89 S.Ct. at 1247; Eisenstadt v. Baird, 405 U.S. 438, 453 n.10, 92 S.Ct. 1029, 1038 n.10, 31 L.Ed.2d 349 (1972).

Though "[t]he courts have not designated homosexuals a 'suspect' or 'quais-suspect' [sic] classification so as to require more exacting scrutiny," DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327, 333 (9th Cir. 1979), heightened scrutiny

(Footnote continued on next page)

of the interests at stake here and in Beller, we apply an intermediate level of review. The classification can be sustained only if it bears a substantial relationship to an important governmental interest. See, e.g., Orr v. Orr, 440 U.S. 268, 279, 99 S.Ct. 1102, 1111, 59 L.Ed.2d 306 (1979)(gender-based discrimination).

The government has a compelling interest in maintaining a strong military force. Underlying our holding in Beller was the judgment that those who engage in homosexual acts severely compromise the government's ability to maintain such a force. That judgment was the basis for our hold that the Navy's policy of discharging all such persons was constitutionally permissible.

The convening authority may select

(Footnote continued from preceding page) is independently required where a classification penalizes the exercise of a fundamental right. See Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969). It does so here.

those cases for referral to a court-martial which involve violations of the UCMJ which are most likely to undermine discipline and order in the military. In light of Beller, we hold that selection of cases involving homosexual acts for Article 125 prosecutions bears a substantial relationship to an important governmental interest.

IV.

We next consider Hatheway's constitutional challenges to Article 125 itself.

A.

Hatheway claims Article 125 is unconstitutional as applied to private, heterosexual acts. The Secretary argues he lacks standing to make this claim. We agree.

The general rule is that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others . . . ." Parker v. Levy, 417 U.S. at 759,

94 S.Ct. at 2563, quoting from Broaderick v. Oklahoma, 413 U.S. 601, 610, 93 S.Ct. 2908, 2914, 37 L.Ed.2d 830 (1973). Standing will be found only where there are "weighty countervailing policies." Id.

Parker involved a challenge to two sections of the UCMJ on 'void for vagueness' grounds. The Court emphasized that the First Amendment is applied uniquely in a military setting. The need for discipline and order justify limitations on individual speech and conduct that would violate the First Amendment in a civilian setting.

It held that similar concerns justify a narrow rule of standing:

> [F]or the reasons dictating a different application of First Amendment principles in the military context described above, we think that the 'weighty countervailing policies'. . . which permit the extension of standing in First Amendment cases involving civilian society, must be accorded a good deal less weight in the military context.

Id. 417 U.S. at 760, 94 S.Ct. at 2560 (citation omitted).

Hatheway relies on Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), for the proposition that a 'chilling effect' on the exercise of personal autonomy rights gives him standing to challenge Article 125 as it applies to private, heterosexual acts.

In Carey, the plaintiffs were held to be in the position of vendors who "have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for rights of third parties who seek access to their market or function." Id. at 684, 97 S.Ct. at 2015. Carey does not support the proposition that an alleged abridgement of personal autonomy rights is a sufficient basis for relaxing the usual rules of standing.

Even if Article 125 has an effect on personal autonomy rights, that effect is not sufficiently weighty in a military setting to let Hatheway assert the rights of others as a basis for voiding his

conviction. Moreover, as in Parker, this statute might be applied validly in many settings (e.g., to acts committed in public). Hatheway has not overcome the Court's "reluctance to strike down a statute on its face where there [are] a substantial number of situations to which it might be validly applied." 417 U.S. at 760, 94 S.Ct. at 2563.

B.

Hatheway argues Article 125 violates the First Amendment's prohibition of laws respecting an establishment of religion. He has referred to the religious origins of laws against sodomy, a fact the Army does not dispute. Whether Article 125 violates the establishment clause thus depends on whether it "still retains its religious character." McGowan v. Maryland, 366 U.S. 420, 431, 81 S.Ct. 1101, 1108, 6 L.Ed.2d 393 (1961).

McGowan upheld Sunday closing laws

against an establishment clause challenge. The Court noted that such laws had undergone extensive changes from their earliest forms and were often advocated by trade associations and labor groups. Id. at 433-45, 81 S.Ct. at 1109-15. It held the laws valid because their present purpose and effect, to provide a uniform day of rest, reflected legitimate secular goals.

Two courts have relied on McGowan to reject establishment clause challenges to sodomy laws. Stewart v. United States, 364 A.2d 1205, 1208-09 (D.C. 1976); People v. Baldwin, 37 Cal.App.3d 385, 388-89, 112 Cal.Rptr. 290, 291-92 (1974).

The Army has not demonstrated that sodomy laws have undergone substantial revisions from their earliest forms, nor that they have been advocated by secular groups. However, the secular policies asserted by the Army, such as preventing disruptive conduct, were accepted in Beller as legiti-

mate justifications for the Navy's prohibition of homosexual conduct. 632 F.2d at 811. We have found that they support the convening authority's classification of homosexual and heterosexual conduct. We therefore hold that in a military setting the proscriptions of Article 125 have a legitimate secular purpose and effect.

C.

Hatheway contends Article 125 is unconstitutional because it violates his right to personal autonomy. Although we agree that Article 125 restricts the exercise of such rights, Beller is again dispositive. As noted above, we held that in the military "the importance of the government interests furthered. . .outweigh[s] whatever heightened solicitude is appropriate for consensual private homosexual conduct." 632 F.2d at 810.

Beller did note that "[t]he instant cases. . .are not ones in which the state

seeks to use its criminal processes to coerce persons to comply with a moral precept even if they are consenting adults acting in private without injury to each other." Id. We can scarcely characterize Hatheway's conduct as having been "in private," because Lynde's roommates came and went while Hatheway and Lynde were in the room. In this setting, Hatheway's right to personal autonomy is of less weight, cf. Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969)(right to receive information takes on added weight in the privacy of one's home), and is overcome by the governmental interest in deterring homosexual conduct by members of the armed forces.

V.

The final issue is whether the Military Judge's instruction on reasonable doubt, note 1 supra, violated Hatheway's right to due process. Proof beyond a reasonable doubt was defined in terms of proof upon which

the jury would be "willing to act," and reasonable doubt was twice equated with "substantial doubt." Hatheway argues the error was significant because there was a close issue regarding his defense of unconsciousness.

Those aspects of the instructions have been criticized, but never held to be reversible error. Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954)("willing to act"); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978)("substantial doubt")(dictum).

The test is whether the instruction, "taken as a whole, fairly and accurately conveys the meaning of reasonable doubt." United States v. Robinson, 546 F.2d 309, 314 (9th Cir. 1976), cert. denied., 430 U.S. 918, 97 S.Ct. 1333, 51 L.Ed.2d 596 (1977). Even if there were a close question on Hatheway's unconsciousness defense, or

one concerning Lynde's veracity, there was no constitutional error in the instruction. Proof beyond a reasonable doubt was defined as "proof to a moral certainty." The other aspects of the instruction, while perhaps not ideal, did not obscure or distort the meaning of reasonable doubt.

AFFIRMED.

UNITED STATES COURT OF MILITARY APPEALS

U N I T E D S T A T E S, Appellee, v. Joseph G. HATHEWAY, JR. (560-82-1856), Appellant	USCMA Dkt. No. 35296/AR CMR Dkt. No. 434634/G O R D E R

On various grounds, the accused challenges his conviction for sodomy with an enlisted serviceman, in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. §925. Similar arguments were considered and rejected in United States v. Scoby, 5 M.J. 160 (C.M.A. 1978). It is, therefore, by the Court, this 22nd day of August 1978,

ORDERED:

That the decision of the United States Army Court of Military Review be, and the same hereby is, affirmed.

For the Court

/s/ FRANCIS X. GINDHART

Clerk of the Court

cc: The Judge Advocate General of the Army

Appellate Defense Counsel

Appellate Government Counsel

UNITED STATES ARMY COURT OF
MILITARY REVIEW

Before
CLAUSE, COSTELLO and TALIAFERRO
Appellate Military Judges

UNITED STATES, Appellee	)	
	)	
v.	)	
	)	CM 434634
First Lieutenant JOSEPH	)	
	)	Hqs, V Corps
G. HATHEWAY, JR.,	)	
	)	G.W. Harrell,
SSN 560-82-1856,	)	
	)	Military Judge
United States Army,	)	
	)	
Appellant.	)	

Christopher Coates, Esquire, argued the cause for appellant. With him on the brief was David Addlestone, Equire.

Major Steven M. Werner, JAGC, argued the cause for the appellee. With him on the brief was Colonel Thomas H. Davis, JAGC.

11 November 1977

MEMORANDUM OPINION

Per Curiam:

The appellant was convicted by general court-martial of the offense of sodomy and was sentenced to be dismissed from the service.

Several issues have been raised on appeal and have been ably briefed by appellate counsel. After careful consideration of the briefs and oral arguments we have concluded that the assigned errors are without merit. However, one issue needs to be commented upon.

The appellant did not deny that the purported offense may have occurred, but maintained that he had no recollection of such an occurrence nor would his participation have been a conscious one if in fact the act had occurred. In support of its theory the defense introduced evidence of other instances of drunkenness after which the appellant had no recollection of his actions during that period. The intro-

duction of this evidence included by necessity the introduction of several instances of uncharged misconduct. Prior to his instructions the military judge stated that he would instruct the court members with respect to the uncharged misconduct. He gave his listing thereof and requested both counsel to insure that his enumeration was complete. Appellant's civilian counsel determined that he desired no instruction on uncharged misconduct and specifically requested that said instruction not be given.

Subsequent to the trial of this case the United States Court of Military Appeals decided the case of United States v. Grunden, 24 U.S.C.M.A. 327, 54 C.M.R. 1053, __M.J.__ (1977). The Court stated therein that, "When evidence of uncharged misconduct is permitted, nothing short of an instruction will suffice." Although we note numerous circumstances which would justify a different rule for a case such as the instant one, we are bound

to conclude from the Court's language that they intended no exceptions regardless of circumstances. Thus, we must conclude that the failure of the military judge to give the instruction constituted error.

We consider that the error is one that may be tested for prejudice. United States v. James, ___M.J.___ (ACMR 6 July 1977). Because of the nature of the defense the government evidence of the events charged was unopposed. We find the evidence of guilt to be overwhelming. It is inconceivable that the defense evidence of other misconduct may have in any way influenced the decision of the fact finders as to appellant's guilt. It is also noted that the nature of the uncharged misconduct introduced was not the type from which one might infer that a person possessed the characteristics of a sex offender. We find no prejudice to the appellant in the instant case.

The findings of guilty and the

sentence are AFFIRMED.

FOR THE COURT:

JAMES D. KEMPER, JR.

Clerk of Court